Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CLINTON MANGES, DAVID MYERS & CARL SHANKLIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A TRIAL COURT CAN, CONSISTENT WITH DUE PROCESS AND THE RIGHT TO TRIAL BY JURY, SENTENCE A DEFENDANT, CONVICTED BY GENERAL VERDICT OF CONSPIRACY AND/OR MAIL FRAUD, UNDER THE HARSHEST GUIDELINES APPROPRIATE TO THE MOST SEVERE OF THE ALLEGED OBJECTS OF THE CONSPIRACY AND/OR MAIL FRAUD; PARTICULARLY, WITHOUT MAKING REQUESTED AND PROMISED FACTUAL FINDINGS ABOUT THE OBJECT OF THE CONSPIRACY?

2. WHETHER A COURT OF APPEALS CAN, CONSISTENT WITH DUE PROCESS, THE RIGHT TO TRIAL BY JURY AND FEDERAL RULE OF CRIMINAL PROCEDURE 32(c)(1), AFFIRM A TRIAL COURT'S DECISION TO SENTENCE A DEFENDANT, CONVICTED BY GENERAL VERDICT OF CONSPIRACY AND/OR MAIL FRAUD, UNDER THE HARSHEST GUIDELINES APPROPRIATE TO THE MOST SEVERE OF THE ALLEGED OBJECTS OF THE CONSPIRACY AND/OR MAIL FRAUD, BY RESORT TO "IMPLIED" FACTUAL FINDINGS?

3. WHETHER THIS COURT'S HOLDING IN *UNITED STATES V. LOVASCO* REQUIRES BAD FAITH ON THE PART OF THE GOVERNMENT IN ORDER TO JUSTIFY DISMISSAL OF AN INDICTMENT DUE TO PREJUDICIAL, PREINDICTMENT DELAY OF FIVE YEARS, WHICH DELAY RESULTED, AMONG OTHER THINGS, IN THE DEFENDANT'S INABILITY TO TESTIFY ON HIS OWN BEHALF DUE TO STROKES AND SEIZURES SUFFERED BY THE DEFENDANT?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, Clinton Manges, Carl Shanklin and David Myers, jointly and by and through their counsel of record, respectfully present this petition to review an opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioners' were convicted after a jury trial and their convictions were affirmed on direct appeal by the Fifth Circuit Court of Appeals. *See* **Appendix A**; *United States v. Manges*, 110 F.3d 1162 (5th Cir. 1997). Petitioners' timely filed Suggestion For Rehearing *En Banc* was denied on May 21, 1997. *See* **Appendix B.** The issues raised in this petition were adversely decided against Petitioner by the Court of Appeals.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S.S.G. § 2B1.2(d)

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

U.S.S.G. § 2B1.2, APPLICATION NOTE 5

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

Federal Rule of Criminal Procedure 32(c)(1)

> At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

STATEMENT OF THE CASE

The record in this case is extensive. Pursuant to Supreme Court Rule 14(g), Petitioners have endeavored

to keep their recitation of the facts brief and related only to those issues presented in this Petition.

A. PROCEDURAL HISTORY

On September 14, 1994, Manges, Myers and Shanklin were indicted in a three count indictment. All three were named in count one, which charged a conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 involving 18 U.S.C. §§ 1341 and 1346, 4 R. 6. Myers and Shanklin were also charged in count two with mail fraud and aiding and abetting in violation of 18 U.S.C. § 1341, § 1346 and § 2. 4 R. 12. Only Manges was charged in count three with bribery under 18 U.S.C. § 666.

Among the pretrial motions filed by Petitioner Manges was a Motion to Dismiss Due to Excessive and Prejudicial Preindictment Delay. 1 R. 133 *et seq*. The government did not file a response to this motion. The motion was denied without a hearing. 1 R. 159.

Manges, Myers and Shanklin were put to trial and after the trial court entered a judgment of acquittal on count three as to Manges, 34 R. 134-142, the jury convicted Myers and Shanklin on counts one and two and Manges on count one by general verdict. 6 R. 487. The trial court sentenced all Petitioners under the Guidelines relating to defrauding citizens of their intangible right to honest government. 36 R. *et seq*. The sentencing transcript reflects that the trial court twice promised to make factual findings relating to the objects of the conspiracy and mail fraud counts and to the sentencing adjustments that related to the alleged involvement of a high government official. 36 R. 10-11, 43-44, 59. No findings were ever

made, even though the last page of the sentencing transcript reflects the trial court's second promise to make the requested findings for the record.

The Fifth Circuit affirmed Manges' and Myers' convictions for conspiracy (count one) and Myers' and Shanklin's convictions for substantive mail fraud (count two). *Manges, supra.* Shanklin's conspiracy conviction under count one was reversed as time barred due to the statute of limitations. *Manges,* 110 F.3d at 1169-70. The sentences of all three Petitioners were affirmed in all respects. Petitioners' timely filed Suggestion For Rehearing *En Banc* was denied on May 21, 1997.

B. STATEMENT OF FACTS PERTINENT TO PETITION FOR CERTIORARI

Both the conspiracy (count one) and the substantive mail fraud (count two) charged Appellants on two theories of liability: (1) that Appellants deprived the citizens of the State of Texas of their intangible right to the honest services of their governing officials; and (2) that Appellants defrauded the State of Texas of property through fraudulent misrepresentations. The goal of both the alleged mail fraud and conspiracy was to deceive the General Land Office ("GLO") of the State of Texas and prevent the lapse of a oil lease on State Tract 350. According to the government (and the panel), Myers with the support of Shanklin submitted false production and work reports to the GLO.[1]

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[1] Generally speaking, a Texas oil and gas lease will lapse if the lessee fails to produce in paying quantities or fails to

Manges' supposed role was the "bribery" of the Chief Clerk of the GLO, Jack Giberson. It is impossible to tell from the jury's general verdict what theory the jury relied upon for conviction. There are significant problems from the perspective of sentencing if the trial court and jury relied upon Manges' alleged bribery as a basis for conviction. Brief elaboration is required.

The principal evidence of bribery came in the form of post-conspiracy admissions (tape recorded) of Manges purporting to detail his alleged bribery of Jack Giberson. *See* Government's Exhibits 406-A and 407-A. It is undisputed that the tapes were inaccurate in a number of material ways. The crucial inquiry, however, is that it is uncontested (and certainly unproven) that Jack Giberson received any bribes or exercised any discretionary authority over the handling of State Tract 350. Brief elaboration is required.

Manges owed Jack Giberson's son, Richard Giberson, more than $70,000 in back salary and on a promissory note. 28 R. 71 *et seq*; 33 R. 130, 139-140. Manges had promised Richard Giberson that notwithstanding his bankruptcy, he (Manges) would eventually repay the entire debt. *Id*. Manges made a series of five payments to Richard Giberson, 27 R. 170-80, 190. The Government alleged only the last two payments to be corrupt, even though all five payments were made during time frame of the alleged conspiracy. Because Richardson Giberson had moved to California, he instructed Manges to give the

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demonstrate "workover." Other savings clauses (not pertinent to the instant issues) might also save a lease from lapsing. 22 R. 120-122.

money to his father in Austin. 33 R. 147. This is precisely what Manges did. All five payments were deposited into Richard Giberson's account in Texas by various family members. As to the two alleged corrupt payments, they were as follows: (1) on July 11, 1989, Manges handed Robert Giberson (Richard's brother, who was an attorney) $6,400 cash which was immediately deposited into Richard Giberson's account by Robert Giberson, 27 R. 181-82; and (2) in late July 1989, Manges gave Jack Giberson $3,700 cash which Jack Giberson immediately took to Robert Giberson, who in turn deposited it into Richard Giberson's account. 27 R. 190. Jack Giberson never received the benefit of any of these funds. Neither the government nor the Fifth Circuit has suggested otherwise. Finally, these payments by Manges covered a period of time when he repaid well over $500,000 to pre-existing creditors. 32 R. 79-119. In regard to the payments to Richard Giberson, the trial court instructed the jury that:

> "You are instructed that payment of a pre-existing debt is not a corrupt bribe, even if the person paying the debt has business before the high level government official. For a payment on a pre-existing debt to be corrupt bribes, there must be a specific request by the person making the payment for the high level government official to act or to restrain from acting regarding transactions as a goal for the payment. It is not enough if the person making the payment is making them to create goodwill or with the expectation of help in the future. Furthermore, vague expectations of some future benefit for payments are not sufficient to make the payments corrupt." 34 R. 188-189.

Jack Giberson testified that Manges never asked him for anything and never even talked about his business at the GLO when he met with him (Jack Giberson) and made any of the five payments to Richard Giberson. 33 R. 241-263. It is also undisputed that Jack Giberson exercised absolutely no discretionary authority over the disposition of State Tract 350, nor did he ever suggest to his staff by implication or otherwise how the matter should be handled. 22 R. 24-25, 142, 163, 234, 259, 263; 26 R. 112, 116, 145-46. Collectively, the testimony of government witnesses and GLO employees, Edling, Pittman, and Petty, indicate that the matter of State Tract 350 was turned over to them by Jack Giberson to exercise their discretion any way they saw fit. *Id.* Edling was given primary responsibility and the matter passed out of Jack Giberson's hands entirely. 26 R. 156. The government did not prove nor did the Fifth Circuit find that Jack Giberson participated in the instant offense in any manner.[2]

SUMMARY OF ARGUMENT

QUESTION PRESENTED NUMBER ONE: The district court and Fifth Circuit erred in sentencing Petitioners – convicted by a general verdict – under the Guidelines appropriate only to the more onerous of the two objectives which were the alleged objects of the conspiracy alleged in count one and the substantive mail.

[2] The Fifth Circuit circumvented the issue entirely by holding that "the guidelines do not require proof that Giberson kept the money or wielded his influence corruptly." *Manges, supra*, 110 F.3d at 1179.

fraud violation alleged in count two. The objectives of these offenses actually constitute elements of the offenses charged. Since it was impossible to tell from the general verdict which object or theory the jury used as a basis for convicting Petitioners, the trial court should have used the Guidelines appropriate to the least onerous objective or theory. To do otherwise infringes upon Petitioners' Fifth and Sixth Amendment rights to due process and to trial by jury since under this Court's opinion in *United States v. Gaudin*, 115 S.Ct. 2310 (1995) only the jury can constitutionally find an element of an alleged offense. In the alternative, the trial court should have made the findings requested by Petitioners during the sentencing hearing, which findings the trial court twice promised to make for the record, relating to the object or theory of conviction beyond a reasonable doubt. The decisions of the trial court and the Fifth Circuit are inconsistent with the opinions of numerous Circuit Courts of Appeal as well as this Court's decision in *Gaudin*. Moreover, this is an issue of nationwide importance because of the inconsistent manner in which the law is applied on this issue and because of the frequency with which the government resorts to use of conspiracy and mail fraud prosecutions.

QUESTION PRESENTED NUMBER TWO: The Fifth Circuit's decision to fill the void occasioned by the trial court's failure to honor its promise to make express findings with "implied findings" only compounds the violations of Petitioners' Fifth and Sixth Amendment rights with further violations of due process because doing so circumvents the express requirements of U.S.S.G. § 2B1.2 and Federal Rule of Criminal Procedure 32(c). The decision renders the Fifth Circuit's opinion inconsistent with

this Court's opinion in *Gaudin* and, implicitly, with the numerous courts of appeal that have addressed the issue from the perspective of the sentencing court. Moreover, the issue is of nationwide importance because permitting implied findings to be made by the appellate court in the face of repeated requests for express findings from the trial court will have the inevitable effect of circumventing the requirements of the Guidelines to the detriment of the purposes and goals of the Sentencing Guidelines.

QUESTION PRESENTED NUMBER THREE: With regard to Petitioner Manges only, the trial court and Fifth Circuit utilized the wrong standard with regard to Manges' claim that he was deprived of due process due to excessive and prejudicial preindictment delay. Though Manges stated a compelling case for actual prejudice and extensive delay, the trial court and Fifth Circuit rejected Manges' claim because he did not allege or prove "bad faith" on the part of the government as the source of the delay. To compound matters, the trial court rejected Manges' claim without a response from the government and without a hearing. The decision of the Fifth Circuit and trial court are inconsistent with the opinions of other Circuit Courts of Appeal as well as numerous state courts of last resort. The lack of clarity with regard to this basic constitutional claim is a matter of nationwide importance, particularly, where, as here, the delay violated the statute of limitations and Manges suffered strokes and seizures which rendered him physically and mentally unable to testify in his own behalf at trial.

REASONS FOR GRANTING THE PETITION

QUESTION ONE – ALL PETITIONERS

1. THERE IS A SPLIT IN THE CIRCUIT COURTS OF APPEAL ON WHETHER A TRIAL COURT CAN – FROM A GENERAL VERDICT – DETERMINE THE OBJECT OR AN ELEMENT OF A CONSPIRACY AND/OR MAIL FRAUD AND IMPOSE A SENTENCE BASED UPON HARSHER GUIDELINES THAN THOSE APPROPRIATE TO THE LEAST SEVERE OBJECTIVE AND, IF SUCH A DETERMINATION IS CONSTITUTIONALLY PERMISSIBLE, THE FINDINGS THAT ARE CONSTITUTIONALLY MANDATED IN SUCH CIRCUMSTANCES.

Broadly speaking, the Circuit Courts of Appeal can be divided into three viewpoints regarding the authority of a trial court to sentence a defendant convicted by general verdict of a conspiracy or mail fraud with multiple objectives.[3]

There is a long line of authority supporting the proposition that when faced with such circumstances, the sentencing court must sentence the defendant under the least onerous of the alleged objectives. *See, e.g., United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir. 1994), *cert.*

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[3] The cases cited and discussed herein are conspiracy cases. The logic of the cases should apply equally to Petitioner Myers' and Shanklin's convictions for substantive mail fraud because that count also involved alternative objectives which – under the court's charge – constituted elements of mail fraud. A trial court can no more find, in the absence of a jury verdict, an element of a substantive offense than it can find an element of the offense of conspiracy.

denied, 514 U.S. 1067 (1995);[4] *United States v. Pace*, 981 F.2d 1123, 1128 (10th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993); *United States v. Owens*, 904 F.2d 411, 413 (4th Cir. 1990); *Newman v. United States*, 817 F.2d 635, 637 (10th Cir. 1987); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083 (2nd Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962). A subset of this line of cases would permit the trial court to determine the object of conviction where the trial court makes appropriate findings and the record is sufficiently clear to enable such a conclusion with "a reasonable degree of certainty." *United States v. Bush*, 70 F.3d 557, 562 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 795 (1996); *see* U.S.S.G. § 1B1.2 and particularly Application Note 5. With the instant opinion, the Fifth Circuit has joined two other circuits in concluding that a trial court can determine the object of a general conviction for conspiracy or mail fraud without regard to the state of the record because there is no constitutional right to jury sentencing. *Manges*, 110 F.3d at 1179 n.16; *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), *pet. filed*, April 21, 1997; *United States v. Conley*, 92 F.3d 157 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 1244 (1997). Under either the first or second viewpoint, all Petitioners are entitled to a remand and resentencing.[5]

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[4] Though *Garcia* is a pre-Guidelines case, the constitutional scope of its rationale reaches application of U.S.S.G. § 1B1.2. *Garcia*, 37 F.3d at 1371 n.4.

[5] Petitioners were convicted by a general verdict of conspiring to commit or committing mail fraud by depriving the State of Texas of property through fraudulent pretenses,

The rationale for the first view – that the Fifth and Sixth Amendments prohibit sentencing a defendant convicted by general verdict to anything other than the range appropriate to the least onerous alleged objective or element – is succinctly stated by the Ninth Circuit:

> An element of the crime of conspiracy . . . is that the conspiracy must be to commit an offense [or to defraud the United States]. If the jury finds no such object of the conspiracy, there is no crime. In this case, the sentencing judge was confronted with two objects of the alleged conspiracy, two different elements, which called for two very different sentences . . . In the absence of a special verdict, there was no way for the sentencing judge to know which object was the necessary element to constitute the crime. Thus, the verdict does not justify [a sentence for the harsher objective].

Garcia, 37 F.3d at 1370. Thus, the rationale for this line of cases does not rest on the faulty proposition that there is some Fifth or Sixth Amendment right to jury sentencing. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that sentencing factors need not be found beyond a reasonable doubt). Put simply, while it is permissible for a sentencing court to make factual determinations that will

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conspiring to commit mail fraud by depriving the citizens of the State of Texas of their intangible right to honest government, or both. It is impossible to tell from the record on what basis the jury convicted. The trial court sentenced Petitioners under the more onerous provisions of U.S.S.G. § 2C1.7 (addressing offense relating to depriving citizens of their intangible right to honest government), as opposed to § 2F1.1 (addressing fraud offenses relating to property).

effect a bottom line sentence, it is just as constitutionally impermissible for the trial court to determine what offense has been committed as it would be to determine that an offense had in fact been committed. This view is particularly consistent with this Court's recent opinion in *United States v. Gaudin*, 115 S.Ct. 2310, 2320 (1995) (prohibiting a trial court from finding an element of an offense in lieu of a jury determination even where the existence of the element revolved around essentially legal determinations).[6]

The direct implication of this view is that U.S.S.G. § 1B1.2 is unconstitutional as violative of the Fifth and Sixth Amendment rights to due process and to trial by jury.

The second view – that the sentencing court can determine the object of a conspiracy if appropriate findings are made and if the record presents the possibility of a "reasonably certain" conclusion – is guided by application of U.S.S.G. § 1B1.2. That section provides in pertinent part:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

U.S.S.G. § 1B1.2(d) (1994). Application note 5 to that section elaborates:

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[6] In fact the Ninth Circuit's decision in *Garcia* cites to its opinion in *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994 *en banc*) which was – as it relates to the issues presented here – affirmed by this Court's holding in *Gaudin*.

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

U.S.S.G. § 1B1.2, Application Note 5 (1994). While this view would still require a remand as to all Petitioners for findings – since no findings were made in this case and findings were requested and promised[7] – it does not comport with the right to trial by jury. In essence, § 1B1.2 and Application Note 5 requires the trial court to do what *Gaudin* expressly prohibits a court from doing; determining the existence of an element of an offense. At a minimum, if this view is affirmed, the trial court should be required to make findings beyond a reasonable doubt as to this particular issue. *In Re Winship*, 397 U.S. 253 (1968). Such findings should not be "implied." *Manges*, 110 F.3d at 1179; *see* Petitioners' arguments as they relate to Question Presented Number 2.

The last view would permit the sentencing court to determine the objective of a conspiracy as it could any other sentencing factor. *See, e.g., Conley*, 92 F.3d at 163-69. These opinions – as well as the opinion in this case – overlook the fact that what the sentencing court is determining is not a mere aggravating or mitigating factor in a defendant's sentence but an element of the offense itself.

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[7] 36 R. 10-11, 43-44, 59.

This is constitutionally impermissible under *Gaudin, supra.*

Under either the first or second view, Petitioners are all entitled to relief. This Court should grant this Petition to resolve this divisive issue.

2. THE GUIDELINES PROVISION THAT PURPORTS TO ALLOW A TRIAL COURT TO DETERMINE THE OBJECT OR AN ELEMENT FROM A GENERAL JURY VERDICT IS UNCONSTITUTIONAL AS INTERPRETED BY THIS COURT'S OPINION IN *UNITED STATES V. GAUDIN*, 115 S.CT. 2310 (1995).

For precisely the reasons discussed in Reason for Granting the Petition Number 1, the Guidelines provision that purports to allow a sentencing court to determine the object or element from a general verdict – U.S.S.G. § 2B1.2 – violates the Fifth and Sixth Amendment guarantees of a defendant's rights to due process and to a trial by jury. Succinctly summarized, the reason is that *Gaudin* prohibits a trial court from finding – in lieu of a jury – any element of an offense. The object of a conspiracy is an element of the offense. 18 U.S.C. § 371; *See also, e.g., Garcia*, 37 F.3d at 1370. Put another way, to constitute a criminal act, the defendants must have conspired to commit some crime (or to defraud the United States) or committed some variety of mail fraud as that offense is defined. Permitting the trial court to determine the object of an offense is permitting the trial court to supplant its findings for that of the jury's. This Court should grant this Petition and address the constitutionality of U.S.S.G. § 2B1.2 in light of *Gaudin*.

3. THE OPINION OF THE FIFTH CIRCUIT IN THIS CASE WHICH PURPORTS TO ALLOW A TRIAL COURT TO DETERMINE THE OBJECT OR AN ELEMENT FROM A GENERAL JURY VERDICT IS INCONSISTENT WITH THIS COURT'S OPINION IN *UNITED STATES V. GAUDIN*, 115 S.CT. 2310 (1995).

For the reasons set out in Reasons for Granting the Petition Numbers 1 and 2, the opinion of the Fifth Circuit in this case is inconsistent with this Court's opinion in *Gaudin, supra,* because the opinion purports to allow the trial court to constitutionally determine the object of a multi-object conspiracy or mail fraud from a general verdict for purposes of sentencing. As set out more fully above, this essentially permits a trial court to find an element of the offense of conspiracy without the necessity of a jury having passed on the specific issue beyond a reasonable doubt. This Court should grant this Petition to correct this deviation from this Court's precedent.

4. WHETHER A TRIAL COURT CAN – FROM A GENERAL VERDICT – DETERMINE THE OBJECT OR AN ELEMENT OF A CONSPIRACY OR MAIL FRAUD AND IMPOSE A SENTENCE BASED UPON HARSHER GUIDELINES THAN THOSE APPROPRIATE TO THE LEAST SEVERE OBJECTIVE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE ADDRESSED BY THIS COURT.

Without question, the biggest gun in the government's arsenal of crimes is the conspiracy charge.

Conspiracy is alleged in nearly every indictment prosecuted in federal court throughout this country. Many, probably most, conspiracies allege multiple objectives. Close behind conspiracy comes the very versatile mail fraud statutes. The ramifications of this issue will therefore likely affect a substantial portion of the federal criminal prosecutions in this country. Since many states have similar theories of liability, the significance is even more widespread. The importance of the issue cannot be underestimated. This Court has not but should address this issue.

QUESTION TWO – ALL PETITIONERS

5. THE COURT OF APPEALS – BY IMPLYING FACTUAL FINDINGS TO SUPPORT THE TRIAL COURT'S DECISION RELATING TO THE OBJECT OR AN ELEMENT OF PETITIONER'S CONSPIRACY AND/OR MAIL FRAUD CONVICTIONS – RENDERED A DECISION THAT IS INCONSISTENT WITH THIS COURT'S OPINION IN *UNITED STATES V. GAUDIN*, 115 S.CT. 2310 (1995).

The Fifth Circuit's opinion in this case compounds the constitutional problems in this case by affirming the trial court's determination of the object and/or elements of Petitioners' convictions for purpose of sentencing. For the reasons set out above, the trial court's determination cannot be made on the basis of a general verdict. That determination necessarily required the trial court to supplant the inherently ambiguous decision of the jury. The error was compounded by the Fifth Circuit by its artificial resort to "implied" findings to justify the district court's already constitutionally unsound decision. *Manges*, 110

F.3d at 1178-80. By affirming the decision of the trial court, the Fifth Circuit has itself violated Petitioners' Fifth and Sixth Amendment rights as defined by *Gaudin, supra,* which requires that a jury pass on all elements of an offense. This Court should grant this Petition to address the implications of *Gaudin* to this issue.

6. THERE IS AN IMPLICIT SPLIT IN AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS ON WHETHER A COURT OF APPEALS CAN IMPLY FACTUAL FINDINGS BY THE TRIAL COURT RELATING TO THE OBJECT OR AN ELEMENT OF AN ALLEGED CONSPIRACY OR MAIL FRAUD.

By affirming the decision of the trial court with "implied findings," the Fifth Circuit implicitly brings itself into conflict with the authorities cited in Reason for Granting the Petition Number 1. Those authorities include cases from the Second, Fourth, Ninth, and Tenth Circuits. Those courts would prohibit the trial court from making such a determination on Fifth and Sixth Amendment grounds, and would therefore by inference, prohibit a Court of Appeals from making the same decision in the trial court's stead. This Court should grant this Petition in order to reconcile this split in the Circuit Courts of Appeal.

7. THE RESORT TO IMPLIED FINDINGS BY THE COURT OF APPEALS IS A STRAIGHTFORWARD VIOLATION OF DUE PROCESS IN THAT IT CIRCUMVENTS THE REQUIREMENTS OF U.S.S.G. § 2B1.2(d) AND FEDERAL RULE OF CRIMINAL PROCEDURE 32(c).

The Fifth Circuit's resort to "implied findings" creates additional constitutional problems with regard to Petitioners' sentences.[8]

There is no authority for the Court of Appeals to have made "implied" findings – essentially the Court of Appeals granted themselves the authority to make such findings. More significantly, the "implied findings" of the Court of Appeals circumvents the law in a way that violates procedural and substantive due process. Finally, the resort to "implied findings" is belied by the record in the sense that: (1) the record affirmatively demonstrates that no findings could possibly be implied; and (2) the implied findings are clearly erroneous as contrary to the undisputed evidence. The additional layer of constitutional violations that the Court of Appeals stacked on top of this case further supports a grant of this Court's certiorari jurisdiction. Brief elaboration is required.

Factual findings made by the Court of Appeals – either expressly or in the guise of "implied findings" made by the trial court – run afoul of the requirements of

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[8] In essence, the Fifth Circuit found that the district court "implicitly" found beyond a reasonable doubt that the Petitioners were guilty of the intangible rights theory of prosecution which supported their sentences under the more onerous provisions of § 2C1.7.

U.S.S.G. § 2B1.2 viewed in conjunction with Federal Rule of Criminal Procedure 32(c). Federal Rule of Criminal Procedure 32(c) requires that "[f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account, or will not affect, sentencing." By implying findings on this issue, the Fifth Circuit has circumvented the express requirements of Rule 32(c). The result is particularly problematic when the absence of findings relates to U.S.S.G. § 2B1.2(d) which requires findings based upon "reasonable certainty" – according to the Fifth Circuit "beyond a reasonable doubt." *Manges*, 110 F.3d at 1179. Circumventing the letter and spirit of the law in this fashion cannot be reconciled with any traditional notions of due process.

Also worth noting is the fact that the record is clear: no findings, express or implied, were made by the trial court. The record is clear because the trial court twice acknowledged the need for findings and promised to make findings at the conclusion of the sentencing hearing. 36 R. 10-11, 43-44, 59. However, the trial court failed to make the promised findings. Rather than remanding the case for those findings, the Fifth Circuit found "implied findings." This Court should grant certiorari and under its supervisory powers, ensure that Courts of Appeals do not circumvent Rule 32(c).

8. WHETHER A COURT OF APPEALS CAN IMPLY FACTUAL FINDINGS BY THE TRIAL COURT RELATING TO THE OBJECT OF AN ALLEGED CONSPIRACY WHERE THE DEFENDANT REQUESTED FINDINGS, THE TRIAL COURT AGREED TO MAKE FINDINGS, AND FINDINGS WERE NEVER MADE, IS AN IMPORTANT QUESTION OF FEDERAL LAW.

The resort by the Fifth Circuit to "implied findings" where findings beyond a reasonable doubt were expressly required by U.S.S.G. § 2B1.2 and Federal Rule of Criminal Procedure 32(c) is a matter of nationwide significance that has not been but should be addressed by this Court. Taken to its logical conclusion, the resort to "implied findings," particularly where, as here, findings were requested, promised and never made, would permit the Courts of Appeals to essentially ignore the literal import of Rule 32(c) and therefore basic due process. Such implied findings would have the inexorable effect of watering down the Guidelines themselves which are designed to obtain sentencing uniformity across the nation and which require findings in order to ensure uniformity. Enabling Courts of Appeal to "rubber stamp" district court conclusions – as opposed to findings – by filling the void with implied findings in the manner accomplished in this case will be to the long term detriment of these laws and rules. This Court should grant this Petition to address this important issue.

QUESTION THREE – PETITIONER MANGES ONLY

9. THE OPINION IN THE INSTANT CASE – WHICH FOLLOWS THE *EN BANC* OPINION OF THE FIFTH CIRCUIT IN *UNITED STATES V. CROUCH*, 84 F.3D 1497 (5TH CIR. 1996) – IS DIRECTLY CONTRARY TO EXPRESS LANGUAGE IN THIS COURT'S OPINION IN *UNITED STATES V. LOVASCO*, 431 U.S. 783, 790, 795-96 (1977) WHICH SUGGESTS THAT "BAD FAITH" IS NOT A PREREQUISITE TO RELIEF FROM PREJUDICIAL PREINDICTMENT DELAY.

In *United States v. Lovasco*, 431 U.S. 783, 790, 795-96 (1977)[9] this Court held that the due process would require a prosecution to be dismissed if a defendant were prejudiced by the delay and the reasons allegedly justifying the delay do not outweigh this prejudice. In *Lovasco*, this Court noted that on one end of the spectrum of potential justifications, delay to afford law enforcement more time to investigate was likely to be justifiable. *Id.* At the other end of the spectrum, the government conceded and this Court agreed that intentional delay to gain a tactical advantage over a defendant would be condemned by due process. *Id.* at 795 n.17. Quite clearly, there are a large number of justifications that fall somewhere in the middle of this spectrum. Yet, this Court expressly refrained from "determin[ing] in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Id.* at 796. This Court left the balancing of prejudice and justification for delay to the

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[9] *See also United States v. Marion*, 404 U.S. 307 (1971).

lower courts consistent with the guiding principles – the ends of the spectrum – laid out in *Lovasco*. *Id.* at 796-97.

Though a number of Circuit Courts of Appeal and high state courts have interpreted *Lovasco* to require the balancing of interests just laid out, *see infra*, a number of other courts – including now the Fifth Circuit – have read into *Lovasco* and its progeny an "abstract" *per se* requirement that "bad faith" on the part of the government aimed at gaining a tactical advantage over the defendant is a prerequisite to relief from prejudicial preindictment delay. *See United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 736 (1997); *Manges*, 110 F.3d at 1170. Essentially, *Crouch*, the instant case, and other cases in accord, impose a requirement that the only justification for delay is at one extreme end of the spectrum contemplated by *Lovasco*. This requirement is inconsistent with the plain meaning and language of *Lovasco* which eschewed such rigid and "abstract" requirements.

Petitioner Manges' claim of prejudicial preindictment delay was rejected by the trial court without a hearing and by the Fifth Circuit because of this *per se* requirement that delay have been caused by a "bad faith" attempt on the part of the government to gain unfair advantage. *Manges*, 110 F.3d at 1170. Petitioner Manges stated a compelling case for actual prejudice in his motion to dismiss due to preindictment delay. 1 R. 133 *et seq.* Manges' allegations of prejudice were all supported by affidavit and could have been developed further at a hearing on the motion – but none was held. Sources of actual prejudice included intervening strokes and seizures suffered by Manges, two dead witnesses, and scores of missing documents. *Id.* The strokes and seizures

dramatically affected Manges' ability to recall events and hampered his ability to present a defense more than anything else. Indeed, the strokes effectively prevented Manges from testifying in his own defense.

The delay in this case was substantial – almost exactly five years from the date of the alleged offense and a delay of almost three years from the date on which the government came into possession of had sufficient evidence to proceed. *Id.* The government offered no response to Manges' allegations of prejudice. Nor did the government proffer any justification for the excessive delay. Manges' motion was denied without a hearing or opportunity to develop the constitutional deprivation that he suffered. This Court should grant certiorari.

10. THE OPINION IN THE INSTANT CASE – WHICH FOLLOWS THE *EN BANC* OPINION OF THE FIFTH CIRCUIT IN *UNITED STATES V. CROUCH*, 84 F.3D 1497 (5TH CIR. 1996) – IS DIRECTLY CONTRARY TO THE OPINIONS OF THE FOURTH AND NINTH CIRCUITS ON THIS ISSUE.

Citing this Court's opinion in *Lovasco*, the Fourth Circuit stated:

> Applying these principles of due process to the case at hand, we cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a

> defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990) (citing *United States v. Automated Medical Laboratories*, 770 F.2d 399, 404 (4th Cir. 1985) and granting habeas relief on preindictment delay grounds); *see also Jones v. Commonwealth*, 94 F.3d 900, 905 (4th Cir. 1996) (reaffirming *Howell* in the face of considerable adverse authority). Similarly, the Ninth Circuit has stated and consistently held:

> The determination of whether a pre-indictment delay has violated due process is essentially decided under a balancing test, *Lovasco*, 431 U.S. at 790, [citation omitted], and we do not find that intent or reckless behavior by the government is an essential ingredient in the mix. If mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged.

United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986). The Fifth Circuit's opinion in *Crouch*, *supra*, and in the instant case therefore widens the split amongst the Courts of Appeal on this

issue. This Court should grant this Petition to resolve this split.

11. THE OPINION IN THE INSTANT CASE – WHICH FOLLOWS THE *EN BANC* OPINION OF THE FIFTH CIRCUIT IN *UNITED STATES V. CROUCH*, 84 F.3D 1497 (5TH CIR. 1996) – IS DIRECTLY CONTRARY TO THE OPINIONS OF NUMEROUS HIGH STATE COURTS ON THIS ISSUE.

In addition to the Fourth and Ninth Circuits discussed above, numerous state courts of last resort have found *Lovasco* to require a balancing approach rather than a *per se* requirement that the government acted in bad faith. *See, e.g., Scott v. State*, 581 So.2d 887, 890 (Fla. 1991); *State v. English*, 594 P.2d 1069, 1073-74 (Haw. 1979); *State v. Schlick*, 257 N.W.2d 59 (Iowa 1977); *State v. Krinitt*, 823 P.2d 848, 849 (Mont. 1991); *State v. Ramos*, 553 A.2d 275, 279 (N.H. 1988); *State v. Gonzalez*, 794 P.2d 361, 367 (N.M. Ct.App. 1990), *aff'd, Gonzalez v. State*, 805 P.2d 630 (N.M. 1991) (noting that the Supreme Court of New Mexico has implicitly adopted a balancing approach to prejudicial preindictment delay claims and citing *State v. Duran*, 581 P.2d 19 (N.M. 1978) for the proposition); *State v. Luck*, 472 N.E.2d 1097, 1105 (Ohio 1984), *cert. denied*, 470 U.S. 1084 (1985) (granting relief for prejudicial preindictment delay based upon negligence in bringing prosecution); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996); *State v. Warner*, 889 P.2d 479, 485 (Wash. 1995). The Fifth Circuit's opinion in *Crouch* and in the instant case is therefore in conflict with a number of state courts of last resort. This Court should grant this petition to resolve this issue.

12. WHETHER "BAD FAITH" ON THE PART OF THE GOVERNMENT IS A PREREQUISITE TO CLAIMING A VIOLATION OF DUE PROCESS DUE TO PREJUDICIAL PREINDICTMENT DELAY, AS WELL AS THE PROCEDURES TO BE UTILIZED IN EVALUATING SUCH A CLAIM, IS A MATTER OF NATIONWIDE IMPORTANCE.

The very fact that there is such nationwide division over the general stand for evaluating a due process claim manifestly indicates that the matter is of nationwide importance. In essence, the same constitutional claim is being evaluated differently in different states and different circuits across the country with necessarily different results. *See, e.g., Howell, supra,* and *Duran, supra.* The law of the land should be as consistently and uniformly applied as this Court can make it.

As significant as the standard itself, this Court should resolve the conflict and afford guidance to the lower courts regarding the procedures to be utilized for evaluating a claim of prejudicial preindictment delay. If a threshold showing of prejudice is made, a hearing should be required, yet many courts require that a defendant plead and offer proof that the government acted in bad faith **prior** to a hearing being held on the matter (as in the instant case). *Manges,* 110 F.3d at 1170. Requiring a defendant to plead and prove improper government motivation prior to an evidentiary hearing on the issue is for obvious reasons problematic – the defendant cannot read the government's mind and "bad faith" will seldom be obvious. The result of the lack of clarity on this basic

issue further contributes to the nationwide state of confusion surrounding this basic constitutional claim. Clarification from this Court is appropriate and certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50645

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLINTON MANGES; DAVID WAYNE MYERS; and CARL HUBERT SHANKLIN,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(Filed Apr. 15, 1997)

Before REAVLEY, GARWOOD, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This appeal involves a plot to retain the oil and gas rights to a parcel of submerged property in Corpus Christi Bay, Nueces County, Texas, known as tract 350. The indictment alleged that appellants prevented the leased mineral rights from reverting to the state by submitting false documents to state regulatory agencies and making corrupt payments to a state official.

Appellants appeal their convictions and sentences on charges of conspiracy and mail fraud; their briefs teem with an overabundance of evidentiary, statutory, and constitutional challenges. Many of these claims do not merit full discussion. We are persuaded by only one of appellants' arguments: Shanklin's contention that the conspiracy charge against him was time-barred.

FACTUAL BACKGROUND

Clinton Manges has been described as a legendary figure in South Texas: an oilman and rancher, wheeler-dealer and political kingmaker. Born in poverty in Cement, Oklahoma, Manges amassed a billion-dollar fortune, only to face bankruptcy in 1989 and criminal charges in the instant case.[1] David Wayne Myers, the ringleader of the scheme alleged in the indictment, was an oil industry entrepreneur based in San Antonio, Texas. Carl Hubert Shanklin was an independent contractor who performed "workover" operations on oil and gas wells. Also named in the indictment was Benny Joe McLester, who as the "gauger" for tract 350 was responsible for accurately measuring and reporting its output.

It is unnecessary to detail the various corporate entities through which Myers wielded control over the operations on tract 350. We note simply that Myers, through companies he controlled, at relevant times subleased the oil and gas rights to tract 350 and three adjacent tracts;

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[1] *See, e.g.*, David McLemore, *Oilman Manges Sentenced*, DALLAS MORNING NEWS, Aug. 26, 1995, at A1, *available in* 1995 WL 9055925.

that his close business associate Morris D. Jaffe, Jr., acquired interests in the tracts through an assignment from Myers; and that Myers was instrumental in efforts to convince state regulators that the lease terms were being met.

The mineral rights to tract 350 were controlled by the Texas General Land Office (GLO), which grants subsurface oil and gas rights throughout Texas in a competitive bid process. Successful bidders are required to pay the state yearly rental fees, plus royalties representing a portion of their revenues. Under applicable state regulations, the holder of an oil and gas lease must act affirmatively to maintain the rights granted by the state. The lessee must (1) continuously produce oil and gas; (2) undertake timely and diligent workover efforts to restore or increase productive capacity; or (3) pay a "shut-in royalty" to the state, supported by an affidavit stating that there is no economic market for the tract's resources. To put it another way, if a market exists for a tract's oil and gas, and if the tract fails to produce for 60 days and is not worked over during that time, the lease reverts to the state. Once that happens, the GLO may re-lease the tract to the highest bidder.

It is undisputed that tract 350 should have reverted to the state for lack of production at the time of the events described in the indictment, if not earlier. Myers, Jaffe, and their colleagues, believing that the lease was worth millions, sought to prevent its reversion. Rather than meet the requirements imposed by state law, however, appellants submitted false documents to the GLO and tried to buy the favor of its chief clerk, Jack Giberson.

Appellants and others tried to prevent the reversion of the lease by a variety of methods. Specifically, viewing the evidence in the light most favorable to the verdict, Myers had McLester prepare a series of false production reports claiming that tract 350 had produced various quantities of oil. The false production figures provided by McLester were duly reported to state regulators by the company nominally operating the tract.[2]

Moreover, Myers orchestrated the filing of false shut-in affidavits with the GLO. Three such affidavits were filed, claiming variously that the shut-in was based on the well's lack of production, a lack of market for its oil, and a severed gas line.

Myers swore out an affidavit on July 31, 1989, stating that tract 350 had been worked over at intervals of less than 60 days between June 28, 1988, and July 27, 1989. This affidavit was supported by daily time records and documents called morning field reports, prepared and signed by Shanklin. These documents purported to be contemporaneous records of the work described by Myers; according to the prosecution's evidence at trial, however, they were *post hoc* fabrications designed to convince the GLO that the lease to tract 350 had been maintained.

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[2] The operator of record of an oil and gas lease must report its monthly production to the Texas Railroad Commission in a "P-1" report. The GLO relies on the accuracy of these reports, and was misled when the company operating tract 350 filed reports incorporating McLester's false data.

If Shanklin covered Myers' back in the oil fields of Corpus Christi Bay, Manges fronted for him in the government halls of Austin. Starting in the summer of 1988, Manges tried to convince his contacts in the GLO that the lease to tract 350 had been maintained. Some time that summer, Manges accompanied Jaffe to the GLO to discuss tract 350 with Giberson. Starting soon thereafter, in August 1988, Manges made a series of five payments to Giberson totaling $30,100. The indictment listed the final two payments – $6,400 on July 11, 1989, and $3,700 on July 31, 1989 – as overt acts in furtherance of the alleged conspiracy.

GLO staff members testified that Giberson did not actually influence their decisions regarding tract 350. Moreover, it is undisputed that Giberson did not keep the money; all five payments were deposited in the bank account of his son, Richard Giberson. Richard Giberson had been employed by the San Antonio Gunslingers professional football team; Manges, through a corporation, was the team's principal owner. The defense contends that the payments were partial satisfaction of a $70,000 debt that the Gunslingers corporation owed Richard.

Appellants' efforts to retain the lease to tract 350 seemed to bear fruit. On September 19, 1989, GLO staff geologist Tim Pittman mailed a letter to Jaffe's Redfish Bay Operating Co. – the tract's operator of record at the time – stating that the lease had been maintained.

As an epilogue to the conspiracy, Manges discussed tract 350 in two conversations the following spring with a longtime friend, Crandell Addington. The two friends discussed how Manges had done his "little magic" to

save the lease. They specifically mentioned that documents were "fixed" and that Jack Giberson would not approve the lease unless Manges paid his son, Richard, $10,000. Addington secretly recorded these conversations, which were introduced at trial by the prosecution.

PROCEDURAL BACKGROUND

Appellants and co-defendant McLester were charged in a three-count indictment filed on September 14, 1994, in United States District Court.

The first count charged all four defendants with conspiracy to commit mail fraud and conspiracy to commit bribery. The mail fraud conspiracy had two alleged goals' Its first object was to deprive Texas citizens of money or property, *i.e.*, the lease to tract 350 and the additional royalties that the state would earn if the lease reverted and were rebid. The second object of the mail fraud conspiracy was to deprive Texas citizens of their intangible right to the honest services of a government official, later identified as Jack Giberson. 18 U.S.C. §§ 371 (conspiracy), 1341 (mail fraud), 1346 (mail fraud involving honest services), & 666 (bribery).

Count two charged McLester, Myers, and Shanklin with mail fraud. This substantive count incorporated the two theories underlying the mail fraud conspiracy charged in count one – deprivation of money or property and deprivation of the intangible right to honest government services. The mailing alleged in count two was the September 19, 1989 letter from the GLO to Redfish Bay Operating Co. stating that the lease to tract 350 had been

maintained. 18 U.S.C. §§ 1341, 1346, & 2 (aiding and abetting).

Count three charged Manges alone with bribery. 18 U.S.C. § 666(a) (2).

Pursuant to a plea agreement, McLester pleaded guilty to count one and testified against appellants at trial. At the close of the evidence, the district court entered a judgment of acquittal for Manges on count three. The court held the proof insufficient to establish that the GLO received more than $10,000 annually in federal aid, as required to support a federal bribery prosecution. *See* 18 U.S.C. § 666(b). In its jury charge, the district court also deleted the conspiracy to commit bribery from count one.

On March 10, 1995, after a joint trial, Manges was convicted of conspiracy, and Myers and Shanklin were convicted of both conspiracy and mail fraud. As discussed below, appellants were sentenced at a hearing in district court on August 25, 1995.

DISCUSSION

I. *Appellant Shanklin's Statute of Limitations Defense*

Shanklin claims that he was prosecuted in violation of the applicable five-year statute of limitations. *See* 18 U.S.C. § 3282. With respect to the conspiracy count only, we agree. Our review is plenary. *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir. 1996) (citation omitted).

To satisfy the statute of limitations for mail fraud, the government must prove that the predicate mailing

occurred in the five years before the indictment. *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir.), *cert. denied*, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975). To satisfy the statute for conspiracy, the government must prove that a conspirator committed an overt act in furtherance of the conspiracy in the five years before the indictment. *See Grunewald v. United States*, 353 U.S. 391, 396-97, 77 S.Ct. 963, 969-70, 1 L.Ed.2d 931 (1957).

Shanklin was indicted on September 14, 1994. Accordingly, the government was required to show that both the mailing element of the mail fraud count and at least one overt act in furtherance of the conspiracy occurred in a span of five years before that date. The government claims to have met this burden with respect to both offenses based on the September 19, 1989 letter from the GLO stating that the lease to tract 350 had been maintained. Shanklin argues that the GLO letter cannot serve as the predicate for either crime, and that the government failed to prove any other mailing or overt act within the limitations period.

A. *Mail Fraud*

Shanklin argues that the GLO letter cannot provide the basis for the mail fraud prosecution because the letter was not an "integral" part of the alleged scheme. *See United States v. Vontsteen*, 872 F.2d 626, 628 & n.2 (5th Cir. 1989) (reversing mail fraud conviction because the mailed invoices were not "integral" to the scheme) (citation omitted). Shanklin contends that the statutory period expired five years after the last relevant mailing mentioned in the indictment: the submission of a false morning field report

to the GLO on July 27, 1989. In his view, the GLO letter of September 19 merely confirmed that the alleged scheme had been completed successfully.

We observe at the outset that the mailing in a federal mail fraud prosecution need not be sent by the defendant or his co-conspirator. It may be sent by a victim of the plot or an innocent third party, so long as the mailing is "incident to an essential part of the scheme, . . . or a step in [the] plot." *Schmuck v. United States,* 489 U.S. 705, 710-11, 109 S.Ct. 1443, 1448, 103 L.Ed.2d 734 (1989) (mailing element supplied by duped used-car retailers submitting title applications to state motor vehicles bureau). *See also United States v. Pepper,* 51 F.3d 469 (5th Cir. 1995) (mailing element satisfied by defrauded investors' mailing money to defendant).

The success of the fraud alleged in this case depended upon an affirmative response from the GLO. The scheme's purpose was to secure from the state of Texas the continued right to exploit the mineral resources of tract 350. In our view, a written confirmation from the GLO was "integral" to the success of the scheme; it was a necessary step in the plot.

Vontsteen, relied on by Shanklin, does not lead us to a different conclusion. In *Vontsteen* we held that the mailing of invoices by the victims of a completed fraud could not satisfy the mailing element. However, we recognized that we might have reached the opposite conclusion had the invoices been "legally operative documents" that helped the defendant to complete the fraud. The GLO letter was precisely the sort of "legally operative document" that we had in mind; it represented title to the mineral resources

of tract 350. As such, it was part and parcel of the fraudulent scheme. The GLO letter thus satisfied the mailing element. The government had five years from the mailing to indict Shanklin, and it beat the deadline by less than a week.

B. ***Conspiracy***

Shanklin claims that the September 19, 1989 mailing by the GLO was not the overt act of a conspirator, and thus cannot be considered the last overt act of the conspiracy for limitations purposes. The previous overt acts alleged by the government were Manges' payment of $3,700 to Jack Giberson and Myers' submission of a false affidavit to the GLO. Both these events took place on July 31, 1989 – more than five years before Shanklin was indicted. Consequently, he contends that the conspiracy charge was untimely.

The text of the federal conspiracy statute supports Shanklin's argument. It provides in part:

> If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. The statute thus explicitly provides that for the crime of conspiracy to be complete, one or more of the conspirators must have performed an overt act to bring about the object of the conspiracy. This language cannot be stretched to include the posting of a letter by a non-conspirator.

We have echoed the statutory text: a conspiracy conviction requires proof of "[t]he commission of at least one overt act by one of the conspirators within [the five-year statutory] period in furtherance of the conspiratorial agreement." *United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976).

As the Supreme Court has explained:

> The function of the overt act requirement in a conspiracy prosecution is simply to manifest that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.

Yates v. United States, 354 U.S. 298, 334, 77 S.Ct. 1064, 1085, 1 L.Ed.2d 1356 (1957) (internal citation and quotation marks omitted). In this case, the government failed to show that the conspiracy was still a going concern in the five years prior to the indictment. Accordingly, the indictment was untimely, and Shanklin, having preserved his objection, is entitled to reversal on Count One.[3]

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[3] Although Manges and Myers each executed a written waiver of his statute of limitations defense, Manges now seeks reversal of his convictions due to prejudicial pre-indictment delay. However, he does not contend that the government delayed in bad faith or to secure a tactical advantage. We are therefore bound to reject his claim by the rule established in *United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996) (*en banc*), *cert. denied*, ___ U.S. ___, 117 S.Ct. 736, 136 L.Ed.2d 676 (1997).

II. *The Prosecution's Honest Services Theory*

The indictment alleged, and the jury was instructed to consider, a conspiracy and a fraudulent scheme with two objectives. The first goal was to obtain money or property through fraudulent means, in violation of 18 U.S.C. § 1341. The second was to deprive Texas citizens of their right to the honest services of a state official, in violation of 18 U.S.C. §§ 1341, 1346. Because the jury convicted appellants by a general verdict, we cannot determine whether the jury embraced the first theory, the second, or both.

Appellants contend that this ambiguity compels reversal of their convictions for three reasons. First, they claim that the prosecution's "honest services" theory is legally invalid. Second, they claim that even if the theory is valid today, it did not become good law until the conspiracy was well under way, raising the possibility of an *ex post facto* violation. Finally, they contend that the evidence was insufficient to support their convictions based on the honest services theory.

A. *The Validity of the Honest Services Theory*

Appellants claim that the prosecution's honest services theory is invalid as a matter of law, and that the jury may have convicted them on this unsound basis. They demand that their convictions be vacated under the rationale of *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466,

116 L.Ed.2d 371 (1991).[4] Because appellants did not raise this objection in the district court, the scope of our review is limited. The issue is whether the district court committed plain error by submitting the honest services theory to the jury. *See generally* FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Calverley*, 37 F.3d 160, 162-164 (5th Cir. 1994).

Appellants' attack on the validity of the honest services theory rests entirely on the panel opinion in *United States v. Brumley (Brumley II)*, 79 F.3d 1430 (5th Cir. 1996), *opinion vacated and reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996). The panel in *Brumley II* held that the federal mail fraud statute does not proscribe conduct which deprives the citizens of a state of the honest and impartial services of state officials. *Id.* at 1440. This was the view of the Supreme Court prior to the passage, in 1988, of 18 U.S.C. § 1346. In *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Court held that

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[4] In *Griffin* the petitioner was convicted of a dual-object conspiracy. The Supreme Court held that the insufficiency of proof with respect to one of the conspiracy's objects did not render the conviction invalid. However, the Court distinguished legal error from factual insufficiency, explaining:

> When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Griffin, 502 U.S. at 59, 112 S.Ct. at 474 (citation omitted).

the mail fraud statute was limited in scope to the protection of property rights, and did not reach the intangible right to honest services. *Id.* at 360, 107 S.Ct. at 2882 (construing 18 U.S.C. § 1341). The Court in *McNally* perceived no constitutional obstacle to a broader statute, but stated: "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360, 107 S.Ct. at 2882.

Congress subsequently enacted Section 1346, which explicitly brings within the ambit of mail fraud "a scheme or artifice to deprive another of the intangible right of honest services." In a legislative history that has been described as "clear but sparse,"[5] members of Congress explained that the purpose of Section 1346 was to undo the Supreme Court's statutory interpretation in *McNally*. In *Brumley*, the *en banc* court is considering whether the amended mail fraud statute reaches the deprivation of citizens' right to the honest services of public officials.

We need not answer that question today. It is enough to observe that numerous courts and commentators have interpreted Section 1346 as validating the honest services theory in the context of official corruption. *See, e.g., United States v. Paradies*, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996), *pet. for cert. filed*, 65 USLW 3599 (Feb. 21, 1997) (No. 96-1346); *United States v. Frega*, 933 F.Supp. 1536, 1546-47 (S.D. Cal. 1996) (collecting cases).

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[5] Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 169 (1994) (footnote omitted).

Based on the overwhelming weight of authority recognizing the validity of the honest government services theory, we hold that it was not plain error to submit that theory to the jury in this case.

B. *Ex Post Facto*

Appellants correctly observe that even if the honest services theory is valid today, it did not become good law until November 18, 1988, when Section 1346 took effect. They complain that the jury may have relied on events predating Section 1346 to convict them on the honest services theory, in violation of the *ex post facto* clause. U.S. CONST. art. I, § 9, cl. 3.

Myers' and Shanklin's mail fraud convictions do not violate the *ex post facto* clause. Mail fraud is a discrete offense; the crime is completed when the offending letter is mailed. *See United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994) ("Each separate use of the mails to further a scheme to defraud is a separate offense." (citation omitted)). In this case, the predicate mailing occurred on September 19, 1989 – ten months and one day after Section 1346 took effect. Reliance for this purpose on the GLO letter is not inappropriate, given the evidence that Myers submitted a false affidavit to the GLO on July 31, 1989, and that Shanklin falsified field reports as late as July 27, 1989. The Section 1341 scheme or artifice to defraud extended well beyond the effective date of Section 1346.

Unlike mail fraud, conspiracy is a continuing offense. *United States v. Bermea*, 30 F.3d 1539, 1577 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1113, 130 L.Ed.2d 1077

(1995). The conspiracy in this case straddled the effective date of Section 1346. Two of the alleged overt acts occurred before November 18, 1988; most of appellants' criminal conduct, including the two payments to Jack Giberson charged in the indictment as overt acts, occurred after that date. Because there is "substantial" evidence that appellants participated in the conspiracy after Section 1346 took effect, their prosecution under the honest services theory did not violate the *ex post facto* clause. *See Bermea*, 30 F.3d at 1577-78 (5th Cir. 1994) (citation omitted) (affirming sentence imposed under increased statutory maximum that took effect during conspiracy). *Accord United States v. Garfinkel*, 29 F.3d 1253 (8th Cir. 1994) (construing 18 U.S.C. § 1346).

C. *Evidence Supporting the Honest Services Theory*

Among numerous evidentiary challenges, appellants claim that the facts adduced at trial were insufficient to support conviction on the honest services theory. Because the jury may have relied on that theory, appellants urge reversal of their convictions.

There is no need for this court to decide whether the evidence adequately supports the prosecution's honest services theory. The case was submitted to the jury on two alternative, legally valid theories. If either theory was supported by sufficient evidence, we are bound to affirm. *Griffin*, 502 U.S. at 56-60, 112 S.Ct. at 472-74, *cited in United States v. Fisher*, 22 F.3d 574, 576 (5th Cir. 1994). As we discuss in the next section, the evidence was sufficient to support appellants' convictions on the theory

that they schemed to obtain money or property through false means.

III. *Sufficiency of the Evidence*

All three appellants claim, on numerous grounds, that the evidence was insufficient to support their convictions. Having reviewed all of appellants' insufficiency claims, we will discuss only the least implausible; all are unpersuasive.

A. *Count One: Conspiracy (Appellants Manges and Myers)*[6]

1. *Common Scheme*

Appellants claim that there was no proof of the "essential nature" of the alleged conspiracy. *Cf. United States v. Rosenblatt*, 554 F.2d 36, 42 (2d Cir. 1977) (dismissing the indictment for lack of proof that the defendants conspired to commit the same fraud). They assert that the evidence was insufficient to show a coherent scheme to retain the lease to tract 350, particularly in light of the inconsistent stories they told state officials to explain the tract's failure to produce.

The fact that the conspirators changed their account in the face of official skepticism does not negate the existence of a conspiracy. The government's explanation makes more sense. The prosecution posited a conspiracy

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[6] In light of our resolution of Shanklin's statute of limitations argument, we need not address his claim that the evidence was insufficient to support his conspiracy conviction.

aimed at concealing appellants' failure to fulfill the conditions of their lease:

> Each co-conspirator had a role. McLester (who pleaded guilty) furnished phony reports of production. Myers encouraged McLester's falsities, and was instrumental in giving an aura of propriety to false documents that helped convince GLO that the lease terms had been satisfied. Shanklin contributed to Myers' deceit by preparing bogus reports and invoices reflecting work done on State Tract 350 in intervals of less than 60 days. . . . [A]nd Manges distributed the funds to help the co-conspirators.

On the evidence, a rational jury could have found beyond a reasonable doubt that the appellants were engaged in a scheme to retain the lease by fraudulent means.

2. *Intent: Foreseeability of the Use of the Mails*

Conspiracy to commit mail fraud requires at least the level of intent necessary for mail fraud itself. *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) (internal citations omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 667 (1996). However, there is no specific intent requirement with respect to the mailing element of mail fraud. *United States v. Massey*, 827 F.2d 995, 1002 (5th Cir. 1987). The test is one of reasonable foreseeability: the prosecution need only prove that the defendants "engaged in a scheme to defraud in which they contemplated that the mails would likely be used." *Id.*

The mailing at issue is the September 19, 1989, letter from the GLO to Redfish Bay Operating Co., stating that

the lease to tract 350 had been maintained. As the government points out, the object of the conspiracy was to obtain a clean bill of health for tract 350. The GLO was in Austin; Myers and Jaffe were based in San Antonio, 75 miles away. The letter's author, Pittman, testified that the GLO routinely transacted business by mail.

Appellants contend that this evidence is not enough. They argue that since none of them was employed by the land office, they could not have known that the GLO routinely transacted business through the mail. They also claim that the distance between Austin and San Antonio does not support the conclusion that the use of the mails was foreseeable, especially in light of their own habits of delivering documents by hand and traveling to Austin to do business with the GLO.

Even if appellants' argument were not implausible on its face, the only precedent they cite in its behalf is the first panel opinion in *Brumley*. *See United States v. Brumley* (Brumley I), 59 F.3d 517, 520-22 (5th Cir. 1995), *opinion withdrawn and superseded on reh'g* 79 F.3d 1430, 1432 (5th Cir. 1996), *opinion vacated and reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996). Appellants insist that the first Brumley opinion is still good law. They are mistaken.[7] *See*

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[7] In any event, the cases are easily distinguishable. *Brumley* involved wire transfers of money from Lufkin, Texas, to Beaumont, Texas. The panel found it unforeseeable to the defendant that these transfers would be relayed through a Western Union computer in Missouri. Absent a foreseeable interstate wire transmission, the panel found that Brumley's wire fraud conviction could not stand. Here, in contrast, all that is required is a foreseeable use of the mail. *Compare* 18 U.S.C. § 1341 (mail fraud) *with* 18 U.S.C. § 1343 (wire fraud).

5TH CIR. R. 41.3; *United States v. Pineda-Ortuno*, 952 F.2d 98, 102 (5th Cir. 1992) (once rehearing *en banc* is granted, "panel decision is vacated and of no precedential value").

We conclude that the jury could have found beyond a reasonable doubt that use of the mail was reasonably foreseeable to appellants.

B. *Count Two: Mail Fraud (Myers and Shanklin)*

1. *False and Fraudulent Reports*

Count Two is based in part on evidence that appellants submitted false production reports, shut-in affidavits, and morning field reports. Appellants contend that even if these documents were false, they could not have been fraudulent because they were not false with respect to "material matters." They rely on the Supreme Court's observation that to be "material," a statement must tend naturally "to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it is addressed." *United States v. Gaudin*, 115 S.Ct. 2310, 2313, 132 L.Ed.2d 444 (1995) (internal citation and quotation marks omitted).

Assuming that materiality is an element of the mail fraud charged, it was satisfied in this case. It is self-evident that documents falsely informing the GLO that tract 350 had produced oil, or had been reworked at timely intervals, would tend to influence the GLO's decision regarding the status of the lease.

Appellants insist that their statements were immaterial because the amount of oil production falsely

claimed was inadequate to maintain the lease. In essence, they claim that their lies were not big enough. They also claim that the lease had lapsed before the false documents were submitted. These arguments are belied by the GLO letter itself; the jury could have rationally concluded that appellants' false statements influenced, or had a natural tendency to influence, the GLO's determination that the lease had been maintained.

2. *Mailing in Furtherance*

Myers and Shanklin claim that the evidence was insufficient to prove that either of them caused a mailing in furtherance of a scheme to defraud. A defendant "causes" the mails to be used if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . . " *Sneed*, 63 F.3d at 385 n.4 (quoting *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954)).

We find that the jury could rationally have concluded that Myers was the driving force behind the effort to retain the lease on tract 350; that he submitted a false affidavit to the GLO in a plot to obtain written confirmation that the lease was still good; and that Shanklin prepared false field reports to support Myers' affidavits. It is reasonable to infer that the GLO would not have mailed the confirmation letter of September 19, 1989, but for appellants' submission of these false documents. The GLO mailing was reasonably foreseeable; indeed, it was a desired result of appellants' efforts.

IV. *Motion to Sever*

Each appellant claims that the district court committed reversible error by refusing to try him individually. *See* FED. R. CRIM. P. 14. We disagree.

As a rule, defendants indicted together should be tried together, particularly when they are charged in a common conspiracy. *Zafiro v. United States*, 506 U.S. 534, 537, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993); *United States v. Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986); *United States v. McCord*, 33 F.3d 1434, 1451-52 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2558, 132 L.Ed.2d 812 (1995). Joint trials are not only more efficient than separate trials but also more just, for they tend to avert "the scandal and inequity of inconsistent verdicts." *Zafiro*, 534 U.S. at 537, 113 S.Ct. at 937.

Where joinder is initially proper, we review the district court's refusal to sever for abuse of discretion. *See* FED. R. CRIM. P. 8(b); *McCord*, 33 F.3d at 1452 (quoting *United States v. Faulkner*, 17 F.3d 745, 758 (5th Cir.), *cert. denied*, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994)). To prevail, an appellant must show that:

> (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration.

McCord, 33 F.3d at 1452 (quoting *United States v. DeVarona*, 872 F.2d 114, 120-21 (5th Cir. 1989)).

Appellants' claims of prejudice rest in part on the faulty assumption that no conspiracy existed, or that

none was proven. From that premise, each appellant complains that his trial was polluted with evidence of his co-defendants' misdeeds. Separate trials would have obviated this taint. Of course, we already have determined that the evidence supported the jury's determination that a conspiracy existed. While the district court must guard against undue prejudice, it need not protect conspirators from evidence of their confederates' acts in furtherance of their common illegal aims.

Nevertheless, appellants raise several related contentions which do not rest entirely on their refusal to believe that the evidence of a conspiracy was sufficient. We address these claims in turn.

A. *Shanklin and Myers*

Shanklin and Myers complain that they were prejudiced by the evidence of Manges' cash payments to Jack Giberson. They assert, "No limiting instruction would suffice to cure such prejudice." We disagree. The district court specifically instructed the jury to reach separate decisions on the guilt or innocence of each defendant, based on the evidence with respect to that defendant alone.[8] Cautionary instructions of precisely this sort have

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[8] The district court instructed the jury:

> [T]he case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

been held "sufficient to cure any possibility of prejudice." *McCord*, 33 F.3d at 1452 (quoting *Faulkner*, 17 F.3d at 759).

Shanklin and Myers further claim that Manges was "very unpopular" in San Antonio, where the trial was held. But there is no hint in the record that Manges' reputation in the community resulted in any prejudice to his co-defendants. Shanklin and Myers derive this argument from the transcript of *voir dire*, in which several potential jurors admitting having formed unfavorable impressions of Manges. Having scoured the record, we are satisfied that the district court removed any potential jurors whose negative impressions of Manges might have colored their consideration of the evidence.[9]

Shanklin also claims that he was prejudiced by being tried jointly with Myers, whose role in the scheme was far greater than his own. We have observed repeatedly that "a quantitative disparity in the evidence is clearly insufficient in itself to justify severance." *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996) (internal quotation marks omitted). *See also United States v. Rocha*, 916 F.2d 219, 228 (5th Cir. 1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991).

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[9] *See United States v. Harrelson*, 754 F.2d 1153, 1175 (5th Cir. 1985) (denying one defendant's claim of prejudice based on her co-defendant's loathsome reputation as a hired killer), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985). Appellants' claim is particularly unpersuasive because Myers chose to do business with Manges, and Shanklin opted to falsify documents in Myers' behalf. As we observed in *Harrelson*, "the circumstance that one has chosen odious associates seems a dubious sword." *Id.*

The district court, through attentive management of *voir dire* and appropriate cautionary instructions to the jury, minimized any risk of undue prejudice to Shanklin and Myers. Shanklin and Myers have failed to show that they were prejudiced "to such an extent that the district court could not provide adequate protection." *McCord*, 33 F.3d at 1452 (citation omitted).[10]

B. *Manges*

Manges claims that he was prejudiced in several ways by the district court's refusal to grant a severance. First, Manges claims that he was denied the exculpatory testimony of Shanklin and Myers because, as co-defendants, they exercised their Fifth Amendment right not to testify. We do not agree.

Shanklin's pre-trial offer to testify on Manges' behalf was conditioned upon a demand that he be tried first, and thus was not unequivocal, as required by the fourth prong of the *Broussard* test. *See United States v. Broussard*, 80 F.3d 1025, 1037 (5th Cir.) (to establish prejudice from joint trial, defendant must show that co-defendant would

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[10] Shanklin and Myers also claim that they suffered "prejudicial spillover" from the use of the Addington tapes as evidence against Manges on the dismissed bribery count. We reject this argument. The jury was specifically instructed not to consider the tapes as evidence against Shanklin and Myers. We have held that "the pernicious effect [of spillover] . . . is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government." *Harrelson*, 754 F.2d at 1175 (internal citation and quotation marks omitted).

in fact testify if severance were granted), *cert. denied*, ___ U.S. ___, 117 S.Ct. 264, 136 L.Ed.2d 189 (1996).[11]

Second, Manges complains that the denial of his severance motion exposed the jury to prejudicial testimony that McLester had pleaded guilty in the alleged conspiracy. Counsel for Myers had indicated that he would seek to impeach McLester's credibility by eliciting the fact that he had pleaded guilty and was awaiting sentencing. The prosecution thus was allowed to elicit the information first. Manges contends that at a separate trial, he would not have proffered evidence of McLester's plea, and that consequently the prosecution would have been barred from doing so.

Although evidence of a co-conspirator's conviction is inadmissable as substantive proof of a defendant's guilt, it is "admissible and commonly used for impeachment purposes." *United States v. Leach*, 918 F.2d 464, 467 & n.4 (5th Cir. 1990) (citations omitted), *cert. denied*, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991). *Leach* recognized that the prosecution may elicit evidence of a co-

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[11] On the last day of trial, outside the jury's presence, Manges proposed to call both Myers and Shanklin as witnesses. They indicated that if called, they would invoke their right not testify. The district court consequently refused to call them and denied Manges' renewed motion for severance. This was not an abuse of discretion. "[T]he district court must balance any prejudice to the defendant against the court's interest in judicial economy." *United States v. Lopez*, 979 F.2d 1024, 1035 (5th Cir. 1992) (citation omitted), *cert. denied*, 508 U.S. 913, 113 S.Ct. 2349, 124 L.Ed.2d 258 (1993). Given the late hour, the inefficiency would have been extreme; the testimony's value was uncertain.

conspirator's conviction to "blunt[ ] the sword of anticipated impeachment by revealing the information first." *Id.* at 467 (internal citation and quotation marks omitted). *See also United States v. Valley*, 928 F.2d 130, 133 (5th Cir. 1991). In this case, the district court cautioned the jury that the fact that McLester had pleaded guilty related solely to his credibility, and was not proof of any other defendant's guilt. The court did not abuse its discretion by giving this instruction instead of granting the more extreme remedy of severance.

We have reviewed Manges' remaining contentions with respect to his severance motion. We find them wholly meritless.

V. *Jury Instructions*

Appellants contend that reversal is warranted because the district court erred in instructing the jury. We review objected – to jury instructions for abuse of discretion, affording the district court "substantial latitude" to fashion its charge. *United States v. Gray*, 96 F.3d. 769, 775 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, ___ S.Ct., ___, 1997 WL 70921 (Mar. 17, 1997) (No. 96-7763); *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1798, 131 L.Ed.2d 725 (1995). In the absence of a proper objection, we review for plain error. *See* FED R. CRIM. P. 30, 52(b); *Gray*, 96 F.3d at 775.

A. *Constructive Amendment of the Indictment*

Appellants argue that by mishandling the jury charge, the district court constructively amended the

indictment, in violation of their rights under the Fifth and Sixth Amendments. *See generally United States v. Holley*, 23 F.3d 902, 912 (5th Cir.) (defining constructive amendment) (citations omitted), *cert. denied*, ___ U.S. ___, 115 S.Ct. 635, 130 L.Ed.2d 542 (1994); *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991) (citation omitted), *cert. denied*, 503 U.S. 939, 112 S.Ct. 1480, 117 L.Ed.2d 623 (1992).

This argument rests on the assertion that despite the dismissal of the bribery count against Manges, the jury charge contained "language tracking the elements" of bribery, as defined in 18 U.S.C. § 666. This assertion is entirely unsupported by the record. In reality, the district court omitted any reference to the bribery statute. The court simply permitted the jury to consider two alleged cash payments to Jack Giberson as overt acts in furtherance of the conspiracy. Contrary to appellants' contentions, the district court did not "broaden[ ] the possible bases for conviction from [those] which appeared in the indictment." *United States v. Miller*, 471 U.S. 130, 138, 105 S.Ct. 1811, 1816, 85 L.Ed.2d 99 (1985) (emphasis omitted). Accordingly, there was no constructive amendment.

B. ***Dismissal of the Bribery Count***

Appellants also argue that the dismissal of the substantive bribery count renders their conspiracy convictions infirm. They reason that the jury may have convicted them of either conspiracy to commit mail fraud

or conspiracy to commit bribery. They assert that a conspiracy conviction premised on the target offense of bribery would be "improper" in light of Manges' acquittal "on the facts and law of the substantive offense of bribery under § 666."

This argument is doubly flawed. First, the jury could not possibly have convicted appellants of conspiracy to commit bribery. The district court carefully instructed the jury to consider only two offenses: mail fraud, and conspiracy to commit mail fraud. It is immaterial that one object of the alleged scheme, to deprive Texas citizens of their right to honest government services, bears a passing resemblance to bribery. Second, appellants are grievously misinformed if they believe that they cannot properly be convicted of conspiracy once they or their co-defendant has been acquitted of a related substantive offense. To be convicted of conspiracy, defendants "need not . . . have committed the crime that was its object." *United States v. Duvall*, 846 F.2d 966, 975 (5th Cir. 1988) (citing *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942)).

The district court held the evidence insufficient to submit the bribery count against Manges to the jury. This holding does not provide Manges and his co-defendants an avenue of escape from criminal liability for the distinct offense of conspiracy.

C. *Good Faith Instruction*

Shanklin claims that the district court erred by refusing to instruct the jury that good faith is a defense. The

government argues – and Shanklin does not dispute – that the plain error standard applies because of Shanklin's failure to object as required by FED. R. CRIM. P. 30. *See United States v. Adkins*, 741 F.2d 744, 748 (5th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2113, 85 L.Ed.2d 478 (1985) (applying plain error standard to jury instructions when requirements of Rule 30 are not met).

The district court admonished the jury that before convicting any defendant, it must find that he acted "knowingly" and "willfully." The court defined both these concepts in terms of intent.[12] The jury that convicted Shanklin of mail fraud thus could not have believed that he participated in the scheme without the requisite criminal intent, *i.e.*, in good faith. There was no need for a good-faith instruction, and consequently no error, plain or otherwise. *Storm*, 36 F.3d at 1294.

D. *Supplemental Pinkerton Instruction*

At the conclusion of closing arguments, the district court supplemented its jury charge with an instruction on co-conspirator liability. *See Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Myers and Shanklin appeal their mail fraud convictions on the ground that this supplemental charge departed from the procedures prescribed in FED. R. CRIM. P. 30. Specifically,

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[12] Specifically, the court defined "knowingly" to mean "voluntarily and intentionally and not because of a mistake or [accident]." The court defined "willfully" to mean "voluntarily and purposely with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law."

they argue that the post-argument instruction allowed the jury to consider a theory of criminal liability that defense counsel had no opportunity to rebut. According to appellants, the instruction thus deprived counsel of the opportunity to "intelligently argue the case to the jury." *Cf. United States v. Mendoza*, 473 F.2d 697 (5th Cir. 1973).

Appellants should have requested an opportunity to supplement their closing arguments in the district court. They did not. Appellants cannot claim that they were shortchanged an opportunity to argue the *Pinkerton* issue when they never requested one.

The remaining challenges to appellants' convictions do not merit discussion. We next turn to their sentences.

VI. *Sentencing*

Appellants claim that the district court sentenced them under the wrong section of the United States Sentencing Guidelines and compounded its error by improperly enhancing their offense levels. We reject these arguments for the reasons that follow.

The applicable sentence range under the guidelines is based on two variables: the offense level, which reflects the gravity of the crime, and the defendant's criminal history. *See* U.S. SENTENCING GUIDELINES MANUAL, Ch. 5, Pt. A (Sentencing Table) (1994). The guidelines provide that the base offense level for conspiracy in violation of 18 U.S.C. § 371 is the same as the base offense level for the substantive offense that was the conspiracy's object. U.S.S.G. § 2X1.1(a). Applying this section, the district court assigned each appellant a base offense level of 10

pursuant to U.S.S.G. § 2C1.7, which governs frauds that deprive the public of its intangible right to the honest services of government officials.[13] The district court then increased each appellant's offense level by 8, reflecting the court's finding that the fraud involved[ ] giving a thing of value to a high level employee of the General Land Office. . . . " U.S.S.G. § 2C1.7(b)(1)(B).[14] Based on appellants' total offense level of 18 and their insignificant criminal records,[15] they were subject to a sentence range of 27 to 33 months. U.S.S.G., Ch. 5, Pt. A (Sentencing Table).

The court sentenced Manges to 27 months in prison for conspiracy. Myers was sentenced to concurrent 30-

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[13] Each appellant was assigned the same offense level whether he was convicted of one count or two. In sentencing Myers and Shanklin, the district court grouped the conspiracy and mail fraud counts as components of a common criminal scheme or plan. *See* U.S.S.G. § 3D1.2(b). Consequently, neither Myers nor Shanklin suffered an incremental increase in punishment as a result of his second conviction. *See* U.S.S.G. § 3D1.3(a). Conversely, our reversal of Shanklin's conspiracy conviction does not require resentencing on his mail fraud conviction; he would have received the same offense level had he been convicted of mail fraud alone.

[14] The pertinent subsection states:

> If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

U.S.S.G. § 2C1.7(b)(1)(B).

[15] Myers and Shanklin had no prior convictions. Manges was convicted of making false statements to the Small Business Administration with respect to an equipment purchase in 1959. The district court did not assign Manges any criminal history points based on this offense. *See generally* U.S.S.G., Ch. 4, Pt. A.

month prison terms for conspiracy and mail fraud. Shanklin was sentenced to concurrent 8-month terms for conspiracy and mail fraud; the district court held that his minor role in the offense justified a downward departure from the applicable sentence range.

These sentences must be upheld unless they were imposed in violation of law, resulted from an incorrect application of the guidelines, or departed unreasonably from the applicable sentence range. *United States v. Underwood*, 61 F.3d 306, 308 (5th Cir. 1995) (citing *United States v. Matovsky*, 935 F.2d 719, 721 (5th Cir. 1991) (citing 18 U.S.C. § 3742(e))). We review the district court's interpretation of the guidelines *de novo* and its underlying factual findings for clear error. *Id.* (citing *United States v. Brown*, 7 F.3d 1155, 1159 (5th Cir. 1993)).

Appellants claim that the district court erred by sentencing them as if they had been convicted of conspiring to commit a fraud involving public corruption. In their view, because no one can tell whether the jury adopted the honest services theory, they should have been sentenced under the less onerous guideline for conspiring to defraud another of money or property. *See* U.S.S.G. § 2F1.1 (base offense level of 6).

Appellants recognize that the guidelines empower the district court to sentence them for the more serious of the two charged conspiracies, provided that the district court itself would have convicted them on that basis. The guidelines provide that a defendant convicted of a multiple-object conspiracy count should be sentenced "as if the defendant had been convicted of a separate count of conspiracy for each offense that the defendant conspired

to commit." U.S.S.G. § 1B1.2(d). These hypothetical conspiracy convictions should be grouped according to Chapter 3, Part D of the guidelines, which governs multiple counts of conviction. *Id.* commentary, note 4; *see also United States v. Fisher,* 22 F.3d 574, 576 (5th Cir. 1994). When multiple counts result from a common scheme, they are deemed a single group and are assigned the offense level for the most serious offense in the group. *Fisher,* 22 F.3d at 576.

However, the operation of Section 1B1.2(d) is restricted by its commentary, which cautions:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the subject of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

U.S.S.G. § 1B1.2(d), commentary, note 5. The district court's determination of the conspiracy's object offense "should be governed by a reasonable doubt standard." *Fisher,* 22 F.3d at 577 (quoting U.S.S.G., app. C., amend. 75 (Nov. 1, 1989)).

The district court did not state whether it had concluded beyond a reasonable doubt that appellants were guilty of conspiring to commit mail fraud on the honest services theory. Nevertheless, we believe that such a finding is implicit in the district court record. We have held that findings under Section 1B1.2(d) and note 5 may be either express or implied. *See id.* at 576 (5th Cir. 1994)

(citing *United States v. McKinley*, 995 F.2d 1020 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1405, 128 L.Ed.2d 77 (1994)). In the instant case, the district court held that the offense "involved[ ] giving a thing of value to a high level employee of the General Land Office. . . . " This finding is clear evidence that in the view of the district court, the conspiracy at issue involved a deprivation of the public's right to the honest services of a state government official. Frauds involving high-level public officials are a subset of frauds involving public officials; the district court's finding in support of the 8-level enhancement thus presupposes that appellants were guilty of conspiring to commit a public corruption fraud.[16]

Finally, appellants claim that even if Section 2C1.7 applies, the district court erred by enhancing their offense level based on the involvement of a high-level public official. U.S.S.G. § 2C1.7(b) (1) (B). This argument rests on appellants' contentions that the official, Jack Giberson, never retained any money in connection with the oil lease and never exercised his authority to benefit appellants' interests. This argument is untenable; the

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[16] Appellants also claim that Section 1B1.2(d) and its commentary are unconstitutional because they empower the district court to usurp the jury's fact-finding role. *See* U.S. CONST. amend. VI. We disagree, essentially for the reasons stated in *United States v. Conley*, 92 F.3d 157 (3d Cir. 1996). "[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* at 166 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 92, 106 S.Ct. 2411, 2419, 91 L.Ed.2d 67 (1986) (internal citation omitted)). *But see United States v. Bush*, 70 F.3d 557 (10th Cir. 1995) (procedure authorized by Section 1B1.2(d) & note 5 violates Fifth and Sixth Amendments) (*dicta*).

guidelines do not require proof that Giberson kept the money or wielded his influence corruptly. Enhancement is appropriate if the offense "involved . . . any official holding a high-level decision-making or sensitive position. . . . " U.S.S.G. § 2C1.7(b) (1) (B). It is undisputed that Giberson was a high-level decision-making official, and the district court expressly found that the scheme "involved" him. This finding is not clearly erroneous.

CONCLUSION

The judgment is REVERSED with respect to appellant Shanklin's conspiracy conviction, and count one against him is hereby DISMISSED. The judgment of the district court as to appellants' convictions and sentences is in all other respects AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50645

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CLINTON MANGES, DAVID WAYNE MYERS,
CARL HUBERT SHANKLIN,

Defendants - Appellants

Appeals from the United States District Court for the Western District of Texas, San Antonio

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ON SUGGESTION FOR REHEARING EN BANC

(Filed May 21, 1997)

(Opinion 4/15/97, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato Benavides
United States Circuit Judge

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